Supreme Court, U.S.
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No. 94-366

In The
Supreme Court of the United States
October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., AND FOLDING CARRIER CORP.
Debtors-In-Possession.

UNARCO BLOOMINGTON FACTORY WORKERS,
Petitioners,
v.
UNR INDUSTRIES, INC., ET AL.,
Debtors-Respondents,
and
TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF DEBTORS-RESPONDENTS UNR INDUSTRIES, INC., ET AL.

MALCOLM M. GAYNOR
(Counsel of Record)
RICHARD M. BENDIX, JR.
BRET A. RAPPAPORT
PAUL J. GAYNOR
SCHWARTZ, COOPER, GREENBERGER & KRAUSS
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
(312) 346-1300

Attorneys for UNR INDUSTRIES, INC. et al.
Debtors-Respondents

Chicago Legal Copies, Inc. (312) 332-7777

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I. QUESTIONS PRESENTED

A. Whether Petitioners' appeal from the order of the bankruptcy court confirming the Respondents-Debtors' Chapter 11 plan of reorganization was moot.

B. Whether Petitioners, whose claims allegedly arise out of asbestos-disease diagnosed *prior* to filing of UNR's Chapter 11 case, had standing to challenge an injunction prohibiting suits by future claimants, whose claims arise out of asbestos-disease diagnosed *after* confirmation of the plan of reorganization.

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IV. STATEMENT OF THE CASE

Petitioners seek to overturn 1989 and 1990 Bankruptcy Court orders confirming a plan of reorganization, enjoining actions against the reorganized debtors and approving a trust ("UNR Asbestos-Disease Claims Trust") created pursuant to the plan for the benefit of Asbestos-Disease Claimants.

On July 29, 1982, Respondent, UNR Industries, Inc. and ten of its affiliates (collectively "UNR") filed voluntary petitions under Chapter 11 of the Bankruptcy Code, because they were unable to support the cost of defending 17,000 asbestos-related injury cases then pending. *In the Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1113 (7th Cir. 1984); Petitioners' App. at D and I-2.

Petitioners are a group of individuals alleging claims against UNR resulting from employee exposure to asbestos, before 1970, in a plant operated by a predecessor of UNR. Those claims all arise out of asbestos-disease diagnosed *before* UNR filed Chapter 11.

In the Chapter 11 case, a committee ("Plaintiffs' Committee") was appointed to represent the interests of persons, such as the Petitioners, whose symptoms of asbestos-related disease would become manifest before confirmation of a reorganization plan. Petitioners' App. at K-5. However, due to the long latency period of asbestos-related disease, there were persons who would manifest symptoms of asbestos-related disease *after* confirmation of a reorganization plan ("Future Claimants"). Those persons had interests potentially conflicting with those of the Plaintiffs' Committee's constituency. Therefore, a legal representative ("Legal Representative") was appointed to represent the Future Claimants' interests during the Chapter 11 case. Petitioners' App. at I.

In March of 1989, UNR filed a Plan of Reorganization ("Plan") which was the result of years of negotiation among representatives of trade and institutional creditors, the Plaintiffs' Committee and the Legal Representative. Petitioners' App. at J-1, J-2. Under the Plan, all of UNR's pre-petition debt, including $112 million in trade and institutional debt and over $11 billion in face amount of then existing Asbestos-Disease Claims, was eliminated. In return, creditors and the UNR Asbestos-Disease Claims Trust, received approximately 92% of the common stock of the reorganized debtor ("New UNR"). Petitioners' App. at G-2, G-3. Pursuant to 11 U.S.C. §1129(a)(7)(A)(ii), the bankruptcy court found that the Plan was in the "best interest" of the creditors, because in a liquidation creditors would be unlikely to receive anything due to the massive litigation costs associated with asbestos litigation. Order of Confirmation dated June 1, 1989.

Because New UNR stock would have little or no value if Future Claimants were free to sue New UNR, it was a condition precedent to confirmation of the Plan that, as a supplement to the injunction contained in 11 U.S.C. §524(a)(2), the Bankruptcy Court issue a separate injunction ("Injunction") permanently restraining and enjoining all entities from taking any action against New UNR. The Injunction prohibits lawsuits against New UNR by Future Claimants, regardless of whether they hold "claims" as defined in 11 U.S.C. §101(5). Petitioners' App. at K.

The Plan was accepted by 23,335 holders of Class 5 Asbestos-Disease Claims aggregating $11,428,701,921.61, representing 96% in number and amount of all such claims voted. Tr. *In re UNR Industries, Inc.*, May 31, 1989 before Bankruptcy Judge Coar at p. 284. The Plan was also accepted by 470 holders of Class 4 Unsecured Trade Claims and Other Unsecured Claims aggregating $201,709,056.70, representing 93% in number and 99% in amount of such claims. *Id.* at 283. Class 6 pre-petition shareholders of

UNR, holding more than 99% of its common stock — 2,289,970 shares — also accepted the Plan. *Id.* at 284. The Petitioners objected to the Plan. Petitioners' Objection to Confirmation of Plan, May 1, 1989.

After lengthy hearings, at which the Petitioners were the only objectors, the Bankruptcy Court entered the Injunction and an order Confirming the Plan ("Confirmation Order"). Petitioners' App. at J and K. The Injunction was docketed on June 1, 1989 and the Confirmation Order the following day, June 2, 1989. Petitioners' App. at G-2, G-3. The Petitioners appealed both the Confirmation Order and the Injunction to the District Court.

Although the Plan became effective upon docketing of the Confirmation Order, the Petitioners waited until June 29, 1989 to present a motion to the Bankruptcy Court for a stay pending appeal. Workers' Emergency Motion For Stay Pending Appeal filed with Bankruptcy Court. That motion was denied. In the interim, the Plan was implemented and the public began trading the stock and warrants of New UNR. Petitioners' App. at M-2.

On July 5, 1989, the Petitioners sought a stay of the Confirmation Order from the District Court. Workers' Emergency Motion For Stay Pending Appeal filed with District Court. The District Court denied a stay due to, *inter alia*, the absence of a likelihood of success on the merits (because the appeal had become moot) and because the Petitioners did not furnish a supersedeas bond. Tr. *In re UNR Industries, Inc.*, July 11, 1989 before District Judge Moran.

Petitioners appealed the District Court's denial of a stay pending appeal to the Seventh Circuit, and simultaneously sought a stay pending appeal. On September 5, 1989, the Seventh Circuit denied the Petitioners' request for a stay and affirmed the District Court's denial of a stay pending appeal on the grounds that the Petitioners "failed

to make a strong showing of likelihood of success on the merits" and because "*both substantial injury to other parties and the public's interest factor against a stay.*" *In re UNR Industries, Inc.*, Order Sept. 5,1989 (7th Cir. Case No. 89-2444). (emphasis added).

During the more than five years which have elapsed since the Effective Date of the Plan, numerous irrevocable steps have been taken to implement the Plan and the public has acted in reliance upon the Plan. UNR Asbestos-Disease Claims Trust Appendix I, Items 2, 3, and 4.

The District Court decided the Petitioners' appeals from the Confirmation Order and the Injunction on December 6, 1990. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268 (N.D. Ill. 1990); Petitioners' App. at G. That Court dismissed Petitioners' appeal from the Confirmation Order as moot as to all challenges, except one relating to classification of Petitioners' claims under the Plan.[1] The District Court affirmed the Injunction as it applies to Petitioners, and held that Petitioners lacked standing to appeal the Injunction as it applies to Future Claimants. *Id.* The Court found that Petitioners had standing to appeal the Injunction insofar as it prevented them from (a) suing insurance carriers with whom UNR had settled and (b) pursuing their statutory occupational disease claims against New UNR. However, the Court went on to conclude that Petitioners had no rights against the settling insurers and no right to pursue their statutory occupational disease claims against New UNR. *Id.* Petitioners' App. at G-17 - G-20.

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[1] The Court remanded the case to the Bankruptcy Court to determine wether Petitioners' claims under the Illinois Occupational Disease Act, 820 ILCS 310/1 *et seq.*, fall within Class 2 or Class 5 of the Plan. The issue of proper classification of Petitioners' claims under the Plan is again before the Bankruptcy Court, after a second appeal and remand of this issue from the District Court.

On December 29, 1992, the District Court's judgment dismissing the Petitioners' appeal from the Confirmation Order as moot was docketed, as was that court's judgment dismissing the Petitioners' appeal from the Injunction for lack of standing. Petitioners' App. at E-4. The Petitioners appealed those judgments to the Seventh Circuit. On April 5, 1994, the Seventh Circuit Court of Appeals affirmed the District Court's dismissals of the Petitioners' appeals. Petitioners' App. at B. Petitioners now seek review of the Seventh Circuit's decision by writ of certiorari.

V. REASONS FOR DENYING THE WRIT OF CERTIORARI

This case does not satisfy Rule 10 of the Rules of The Supreme Court of the United States, because it does not present special and important reasons for review on writ of certiorari. If certiorari were granted, the only issues before the Court would be garden variety mootness and standing.

A. Petitioners' Challenge to the Plan is Barred by Principles of Mootness.

The Petitioners' appeal of the Confirmation Order was dismissed by the district court as moot and that dismissal was affirmed by the Seventh Circuit. Therefore, if certiorari were granted, the issue before this Court simply would be whether those appeals were moot. No separation of powers issues would be involved.

Although the Seventh Circuit found that the case was not technically moot, because it hypothesized that granting some form of relief would be possible, that court recognized that undoing all that occurred based on the Plan is "impossible". Therefore, the Court concluded that the Plan should not be disturbed. *In re UNR Industries, Inc.*,

20 F.3d 766, 768 (7th Cir. 1994); Petitioners' App. at C-3 - C-4.

While the Court eschewed the label "equitable mootness", its conclusion is consistent with that of every Court of Appeals to have considered the issue of whether substantial consummation of a plan of reorganization precludes a challenge to the order confirming the plan. *See* cases cited in Brief in Opposition of Respondents the Trustees of the UNR Asbestos-Disease Claims Trust at 8-9 and *Matter of Manges*, 29 F.3d 1034, 1038, n6 (5th Cir. 1994), citing the opinion of the Seventh Circuit in the instant case with approval and characterizing that opinion as:

> [r]ecognizing the *virtually universal* principle that 'a plan of reorganization once implemented should be disturbed only for compelling reasons'....

(Emphasis added.)

Neither the question of whether the case is moot in the technical sense nor the issue of whether the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties should be called "equitable mootness", are important questions of federal law demanding this Court's attention. *See In re Environdyne Industries, Inc.*, 29 F.3d 301 (7th Cir. 1994).

Petitioners' contrived effort to transform this unremarkable mootness ruling into a violation of Constitutional separation of powers principles is without substance. The Court of Appeals did not deny Petitioners their right of appeal nor did it abstain from exercising jurisdiction. On the contrary, the Court *ruled* that under the facts and circumstances of this case concerning implementation of the Plan, equitable mootness principles precluded overturning the Plan at this late date. Because the Court found that the

application of equitable mootness principles disposed of the case, it was unnecessary to reach other issues. That is often the case in federal appeals, and separation of powers principles are certainly not thereby violated. Brief in Opposition of Respondents the Trustees of the UNR Asbestos Disease Claims Trust at 11-12.

B. Petitioners Lack Standing to Challenge the Injunction

The District Court dismissed the Petitioners' appeal of the Injunction for lack of standing. As the court correctly pointed out, the Plan, not the Injunction, provides for "future claimants to be paid out of the Trust." *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 274 (D.C. Ill. 1990) Petitioners' App. at G-7. Since the Injunction is not the "vehicle" by which the Petitioners' interests are affected, the Court concluded "the Workers do not have standing to challenge the Injunction Order, insofar as it concerns the prohibition of suits brought Future Claimants." *Id.* The Court's decision is in accord with well settled principles of standing. A party cannot base its claim upon the rights of others. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 644 (2nd Cir. 1988). Indeed, the very cases relied upon the Petitioners in connection with the "Article III" argument hold that persons such as Petitioners have no standing to assert the rights of other individuals. Petitioners' Brief 20-21.[2]

In affirming the District Court, the Seventh Circuit found it unnecessary to separately address the Injunction. The Court concluded that it would be improper to upset the Plan. Since the Injunction's sole purpose was to insure the

[2] Although five years have passed since confirmation of the plan, not one of the more than 40,000 persons who claim to have manifested asbestos-related diseases during that period and were, therefore, Future Claimants at the time of confirmation, has contested the validity of either the Injunction or Plan.

viability of the Plan, the decision to uphold the Plan was dispositive of the entire case. Petitioners' App. C-8. Clearly, the Court was correct. Since the Plan cannot be disturbed, Petitioners' challenge to the Injunction is meaningless.

C. Petitioners' Challenge to the Plan's Provision for Future Claimants is Without Substance

Because this case was dismissed on mootness grounds, the courts below also found it unnecessary to address in detail Petitioners' argument that the bankruptcy court was powerless to provide for and to enjoin future claims. The Court of Appeals appropriately characterized this argument as "mysterious". Petitioners' App. C-6. Indeed, it is.

The Bankruptcy Court, as a court of equity, acting pursuant to 28 U.S.C. §1334, unquestionably possessed *in rem* jurisdiction to approve the allocation of assets to a trust in satisfaction of asbestos-related claims and to issue an injunction to prevent post-confirmation actions that would undermine the reorganization. *In re W.T. Grant,* 20 B.R. 186, 189 (S.D.N.Y. 1982), *aff'd,* 699 F.2d 599 (2nd Cir.) *cert. denied* 464 U.S. 868 (1988); *In re Johns-Manville Corporation,* 801 F.2d 60 (2nd Cir. 1986). Contrary to the Petitioners' assertions, these actions neither adjudicate future disputes nor conflict with the decisions of other circuits. Petitioners' effort to elevate these routine bankruptcy order to constitutional status is without substance.

VI. CONCLUSION

For the reasons hereinabove set forth, the Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MALCOLM M. GAYNOR
(Counsel of Record)
RICHARD M. BENDIX, JR.
BRET A. RAPPAPORT
PAUL J. GAYNOR
SCHWARTZ, COOPER, GREENBERGER & KRAUSS
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
(312) 346-1300

Attorneys for UNR INDUSTRIES, INC. et al.
Debtors-Respondents

APPENDIX

A. Tr. *In re UNR Industries, Inc.*, May 31, 1989 before Bankruptcy Judge Coar at p. 284.

B. Petitioners' Objection to Confirmation of Plan, May 1, 1989.

C. Workers' Emergency Motion for Stay Pending Appeal filed with Bankruptcy Court.

D. Tr. *In re UNR Industries, Inc.*, July 11, 1989 before District Judge Moran.

E. *In re UNR Industries, Inc.*, Order September 5, 1989 (7th Cir. Case No. 89-2444).

F. Order of Confirmation dated June 1, 1989.